

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY GARNER,

Defendant-Appellant.

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UNPUBLISHED

June 13, 2000

No. 211325

Wayne Circuit Court

Criminal Division

LC No. 97-005270

Before: Kelly, P.J., and Holbrook, Jr. and Griffiin, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), first-degree home invasion, MCL 750.110a; MSA 28.305(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of twenty-five to forty years for the CSC conviction and ten to twenty years for the home invasion conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's first argument is limited to his claim that "insufficient evidence exists to support a conviction" because there was no DNA evidence linking defendant to the crime and because the police did not gather any other objective evidence. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing the evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of first-degree CSC are that the defendant engaged in sexual penetration with another person, that the defendant caused personal injury to the victim, and that the defendant used force or coercion to accomplish the sexual penetration. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f).

Sexual penetration includes sexual intercourse. MCL 750.520a(l); MSA 28.788(1)(l). Force or coercion includes circumstances in which the defendant “overcomes the victim through the actual application of physical force or physical violence,” or “coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the [defendant] has the present ability to execute these threats.” MCL 750.520b(1)(f)(i) and (ii); MSA 28.788(2)(1)(f)(i) and (ii). “The existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence.” *People v Premo*, 213 Mich App 406, 410; 540 NW2d 715 (1995).

The evidence showed that defendant broke into the victim’s house, severely beat and threatened to kill her. He then abducted her, demanded that she have sex with him, and had intercourse with her. Although there was no DNA evidence linking defendant to the sperm found during the physical examination, the victim testified that defendant was the perpetrator. Such testimony need not be corroborated. MCL 750.520h; MSA 28.788(8). The victim’s testimony that defendant sexually penetrated her was sufficient evidence to prove sexual penetration and to support a guilty verdict. *People v Robideau*, 94 Mich App 663, 674; 289 NW2d 846 (1980), *aff’d* 419 Mich 458 (1984).

The elements of first-degree home invasion are that defendant broke and entered into a dwelling house, that at the time he entered, he intended to commit a felony or larceny in the house, and that, at any time while the defendant entered, was in, or exited the house, he was armed with a dangerous weapon or another person was lawfully present in the house. MCL 750.110a(2); MSA 28.305a(2). “[T]o amount to a breaking, some force, no matter how slight, must be used to gain entry.” *People v Kedo*, 108 Mich App 310, 318; 310 NW2d 224 (1981). Defendant’s intent may be proved from circumstantial evidence alone, from facts and circumstances established beyond a reasonable doubt, and from the nature, time, and place of the defendant’s acts before and during the breaking and entering. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985); *People v Hughes*, 27 Mich App 221, 222; 183 NW2d 383 (1970).

The evidence showed that defendant forcibly kicked in the victim’s front door to gain entry. When he entered, the victim and two others were lawfully in the house. Once inside, defendant immediately attacked the victim. Such evidence was clearly sufficient to prove, as the trial court found, that defendant broke and entered the victim’s house with the intent to assault her. There being evidence that defendant was armed with a gun when he committed the offense of first-degree home invasion, he was also properly convicted of felony-firearm. MCL 750.227b(1); MSA 28.424(2)(1); *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998).

Defendant next contends that he was denied the effective assistance of counsel at trial. The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish that a defendant’s right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel’s representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). The defendant must overcome a strong presumption that counsel’s assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding

would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant failed to preserve this issue by moving for a new trial or an evidentiary hearing below. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Review is therefore limited to mistakes apparent on the record. *Price, supra*.

“A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. . . . A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant argues that counsel failed to develop the stipulated medical evidence as an effective defense. Defense counsel's decision not to develop the medical evidence was a matter of trial strategy. This Court will not second-guess counsel regarding matters of trial strategy and will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Finally, defendant has failed to show that the trial court abused its discretion in passing sentence. Defendant's CSC sentence was presumptively proportionate, it being within the guidelines, and defendant has not overcome the presumptive validity of his sentence. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Lyons (After Remand)*, 222 Mich App 319, 324; 564 NW2d 114 (1997).

Affirmed.

/s/ Michael J. Kelly  
/s/ Donald E. Holbrook, Jr.  
/s/ Richard Allen Griffin